

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNEAPOLIS CITY COUNCIL

In the Matter of Las Americas, Inc.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION**

The above-entitled matter came on hearing before Administrative Law Judge George A. Beck, acting as hearing officer for the Minneapolis City Council, commencing at 9:30 a.m. on March 18, 2002, at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing continued on March 19, 20, 25 and 26, 2002. The record closed on May 30, 2002, upon receipt of the final written brief from a party.

Scott Reeves, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the City of Minneapolis (City). Jordan S. Kushner, Attorney at Law, Sexton Building, Suite 636, 529 South Seventh Street, Minneapolis, Minnesota 55415, appeared on behalf of Las Americas, Inc., (Licensee).

NOTICE

This report is a recommendation and not a final decision. The Minneapolis City Council will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions of Law and Recommended Decision. The Licensee will have an opportunity to present argument to the City Council concerning this recommended decision. The City Council's final decision will be made by resolution under Chapter 4, § 17 of the Minneapolis City Charter. The parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis, Minnesota 55415-1382, telephone (612) 673-3136 to learn when the City Council will consider this matter.

STATEMENT OF THE ISSUE

The issue in this proceeding is whether or not disciplinary action should be taken against the licenses held by Las Americas, Inc., related to its operation of grocery stores and restaurants in the City of Minneapolis, due to alleged violations of the Minneapolis Food Code Ordinance, the Minnesota Food Code and other Minneapolis City Ordinances.

SUMMARY

The City has proved repeated violations of the Minnesota Food Code by the Licensee that justify sanctions against its license. The Licensee has failed to prove that Brian Herron influenced the City's inspection of the Licensee's food establishment.

Based upon all of the proceedings, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Las Americas, Inc., operates eight grocery stores in the City of Minneapolis. Las Americas is owned by Selwin Ortega and his wife Odeila. Mr. Ortega immigrated to the United States in approximately 1978. He worked as a police officer assigned to drug investigations in Guatemala City and left the country after his family was threatened. He initially did carpentry and remodeling work and eventually bought two properties in the vicinity of Portland Avenue and Lake Street in South Minneapolis. In November of 1992 Mr. Ortega decided to open his own business, a grocery store, selling foods from Mexico, Latin America and the Caribbean, at 401 East Lake Street. He had no prior experience in food sales. The store was profitable, and he opened a second store and restaurant across the street at 336-340 East Lake Street two years later.

2. At the time that Mr. Ortega opened his first two grocery stores, the neighborhood was frequented by prostitutes and drug dealers and was the site of adult book stores. When the first grocery store opened, it experienced break-ins approximately monthly. As the traffic to the stores from Hispanic customers increased, crime in the area diminished. Mr. Ortega has been involved in the Central Neighborhood Improvement Association, and he and other merchants have talked to drug dealers on the street to discourage their presence. The opening of the grocery stores was followed by other legitimate businesses in the area. The area also has less graffiti than in the past.

3. Since 1994, Mr. Ortega has opened six more stores in Minneapolis. He believes that his relationship with the City's inspectors changed as he opened more stores.

4. The Environmental Health Division of the City of Minneapolis is responsible for periodic inspections of grocery stores and restaurants. The division employs code compliance officers or sanitarians to conduct the inspections. The sanitarians generally have either a bachelor's or master's degree in health science and a state certification. Only one sanitarian speaks Spanish.

5. It is common to find some violations as a result of a routine food establishment inspection. Where six or more critical violations are found, or eleven or more non-critical violations, the City will conduct a reinspection. If a violation is not corrected upon reinspection, the compliance officer issues a written order and the matter may proceed to an administrative hearing within the Environmental Health Division. If the alleged violations are not resolved at that point, a Technical Advisory Committee (TAC) hearing is held. Finally, the matter may proceed to the State Office of Administrative Hearings for a hearing before an Administrative Law Judge, who issues a recommended decision to the City Council. The Division also has the option of issuing a misdemeanor citation to be heard in district court, but it seldom uses this alternative.

Food Managers

6. Effective April 1, 1995 all food establishments were required by ordinance to have at least one full-time person with supervisory responsibilities who has a current Minneapolis Food Manager Certificate. New food establishments had to comply with this request within 90 days of opening.

7. Almost all of the employees of Las Americas speak only Spanish. The City first offered a Food Manager Certificate class in Spanish on October 20, 1997. Spanish language classes were also held in April and October of 1998, June, September and October of 1999, and April and August of 2000.¹ Notice of these classes was sent to Spanish language food establishments.² Notice of the food manager requirement was also given to Las Americas in inspection orders issued to each store.³

8. Under a new state food code adopted in September of 1999, each grocery store must have a food manager who works 40 hours per week. The food code manager must obtain a certificate by completing an eight hour course and passing an examination. The food code manager can designate a person in charge when he or she is not there. The person in charge must be taught the basics of the food code.

9. On June 15, 2000, the Environmental Health Division advised Mr. Ortega that it was aware that several of his grocery store/restaurant locations did not have a food manager. The letter advised Mr. Ortega that the new state law required a certified food manager at each location by July 1, 2000. It stated that Ortega would be in compliance if the Division received a completed registration for the required food

¹ Exhibit 162.

² Exhibit 141.

³ E.g., Exhibit 10, dated 8/22/97; Exhibit 68, dated 10/04/01.

managers by July 1, 2000. The letter also advised Mr. Ortega that there was a Spanish language course available.⁴

10. The first Las Americas employees to attend a food manager certificate class enrolled in August of 2000. Twelve employees enrolled but six decided to attend a later class.⁵

11. In early January of 2001, the Division again urged Las Americas to enroll its employees in the January Certified Food Manager class since five locations were still without food managers.⁶ No Las Americas employees attended the January class. As of February 9, 2001, two locations had food managers while seven did not.⁷

12. Ten employees of Las Americas took the food manager certification class on April 23 and 30, 2001. However, only one passed. On June 8, 2001, a retest session was given for eight of those who failed the April exam. None of the eight who took the retest passed. On June 27, 2001, the Division offered the class and the exam exclusively to Las Americas employees. Six employees passed and seven failed.⁸

13. In a letter dated October 12, 2001, the Division asked Mr. Ortega for an updated list of which certified managers were assigned to which stores.⁹ On October 24, 2001, Mr. Ortega faxed a list of 17 employees who had been certified as food managers and the different locations to which they were assigned.¹⁰

14. On January 15, 2002, the Environmental Health Division asked Mr. Ortega to supply copies of the Food Manager Certificates for the persons listed in his October 24, 2001, letter.¹¹ No response was received. At the March 2002 hearing in this matter, Mr. Ortega submitted 14 Food Manager Certificates. The examination dates for these employees were August 9, 2000 (1), April 30, 2001 (1), June 27, 2001 (4), and September 27, 2001 (8).¹²

15. In addition to a certified food manager, each food establishment must have a person in charge if the food manager is not present. The person in charge supervises employees to ensure sanitation and cleanliness and must be able to demonstrate knowledge of the food code. During a number of inspections, sanitarians were told that there was no person in charge at a store and someone, often Mr. Ortega, would be summoned to the store.

⁴ Exhibit 142.

⁵ Ex. 162.

⁶ Exhibit 143.

⁷ Exhibit 144.

⁸ Exhibit 146.

⁹ Exhibit 147.

¹⁰ Exhibit 148.

¹¹ Exhibit 161.

¹² Exhibit A.

Toilet and Handwashing Facilities

16. In eight inspections from August 30, 1996 to February 8, 2001, sanitarians found 20 violations at the grocery store at 340 East Lake Street related to toilet and handwashing facilities. These violations related to matters such as cleaning and maintaining good repair of the handwashing sinks, soap dispensers and hand drying devices; maintaining a supply of hand cleanser and hand towels; providing a waste receptacle in the women's toilet room; providing a fingernail brush at the employees' handwashing sinks; blocking access to a handwashing sink and maintaining an adequate supply of toilet tissue. Several of these violations were cited repeatedly.¹³

17. Inspectors found eight violations relating to toilet and handwashing facilities at 401 East Lake Street in three inspections conducted from December 8, 1998 to June 14, 2000.¹⁴ At the store located at 2750 Nicollet Avenue inspectors found 14 violations related to the toilet and handwashing facilities in eight inspections beginning on March 13, 1997 through November 20, 2000.¹⁵ From August 24, 2000 to October 4, 2001, the sanitarians found six violations related to toilet and handwashing facilities during four inspections at 1311 E. Franklin Avenue.¹⁶

18. At the store at 6 West 26th Street, seven violations related to toilet and handwashing facilities were found in five inspections beginning on July 1, 1998 through September 21, 2000.¹⁷ At 1930 Clinton Avenue, the inspections showed nine violations related to toilet and handwashing facilities in four inspections dating from January 13, 1997 to April 10, 2001.¹⁸ From March 26, 1998 to January 3, 2002, nine violations related to toilet and handwashing facilities in five inspections were found at the store at 1850 Central Avenue N.E.¹⁹

Food Protection

19. Thirty-eight violations related to food protection were cited by sanitarians at the Las Americas Store at 340 East Lake Street during 13 inspections from August 30, 1996 to April 20, 2001. These violations related to matters such as maintaining hot potentially hazardous food at 150° F. or above, providing an accurate thermometer, storing open food in a sealed container, maintaining cold potentially hazardous food at 40° F. or less, storing food on the floor, maintaining frozen potentially hazardous food at or below 0° F., and storing raw meat so as not to contaminate other foods.²⁰

¹³ Exhibit 3, 5, 10, 12, 14, 19, 21, 23.

¹⁴ Exhibits 33, 37, 38.

¹⁵ Exhibits 45, 47, 48, 49, 50, 51, 52, 53.

¹⁶ Exhibits 59, 60, 63, 68.

¹⁷ Exhibits 76-79, 81.

¹⁸ Exhibits 90, 93, 94, 95.

¹⁹ Exhibits 101, 102, 104, 110 and 158.

²⁰ Exhibits 3, 5, 8, 10, 12, 14, 15, 19-21, 23, 25-26.

20. At the Las Americas store at 401 East Lake Street, during four inspections from December 8, 1998 to July 10, 2000, inspectors found seven violations related to food protection. From March 13, 1997 to July 9, 2001, the store at 2750 Nicollet Avenue was found to have 22 violations related to food protection over the course of seven inspections.²¹ During the course of six inspections at 1311 East Franklin from August 3, 1999 to October 4, 2001, twelve violations were uncovered relating to food protection.²²

21. At the 6 West 26th Street store, seven inspections conducted during July 1, 1998 to April 27, 2001, resulted in 12 violations relating to food protection.²³ From January 13, 1997 to April 10, 2001, inspectors found 10 violations related to food protection at the Las Americas store at 1930 Clinton Avenue.²⁴ At 1850 Central Avenue N.E., the sanitarians found 13 violations during five inspections conducted from March 26, 1998 to April 24, 2001.²⁵ And two inspections conducted on February 9, 2001 and April 24, 2001, revealed three violations related to food protection at the 1522 East Lake Street store.²⁶

Trash and Debris

22. Grocery store owners are required to maintain outdoor areas around their premises free of trash, debris and weeds and in good sanitary condition. They are also required to remove all litter and debris within 100 feet of their property line on a daily basis. Las Americas has been issued a number of orders as a result of trash and debris violations. On April 6, 2001, an inspector found trash and debris at the rear of the building at 340 East Lake Street.²⁷ At 401 East Lake Street inspectors found junk and debris behind the store and on the sidewalks at the front and back during inspections conducted on March 6, 2001, March 22, 2001, April 6, 2001, April 23, 2001, November 9, 2001 and November 27, 2001.²⁸ During the March and April 2001 inspections, some of the trash appeared to be imbedded in not yet melted snow and ice. The situation is not uncommon at that time of year.²⁹ Some of the trash problem was attributable to neighbors of the Las Americas stores.³⁰

23. Although many violations were abated, a significant number of the violations relating to toilet and handwashing facilities, food protection, and trash and debris had

²¹ Exhibits 45-51.

²² Exhibits 57-60, 62-63, 68.

²³ Exhibits 76-79, 81-82, 84.

²⁴ Exhibits 90-91, 93-95.

²⁵ Exhibits 101-102, 104-105, 100.

²⁶ Exhibits 117-118.

²⁷ Exhibit 29.

²⁸ Exhibits 42, 43, 133.

²⁹ Exhibit F.

³⁰ Exhibit G, I.

not been corrected at the time of the reinspections. Some were repeatedly not corrected from inspection to inspection.³¹

Recent Violations

24. On April 30, 2001, the environmental health division received a complaint about a rat running down one of the aisles in the grocery store at 1522 East Lake Street. Upon inspection the sanitarian found mouse droppings in a display cabinet on the retail floor, rodent droppings in the basement, a dead rodent in the basement and clutter and debris in the basement providing rodent harborage.³² On September 5, 2001 the division received another complaint from two different customers about observing a rat in the store. Upon inspection no rodent infestation was found but places of harborage were again found in the basement due to storage of unnecessary articles. Additionally the dumpster was open and accessible to rodents.³³

25. Las Americas presently employs 80 people and has a certified food manager at each store and four or five extra certified food managers to send to stores as needed. Mr. Ortega hired a full-time quality control manager who oversees equipment and maintenance in May of 2001. He has worked at regular maintenance of the stores since that time.³⁴ At present Las Americas has contracts in place for regular waste pickup with Aspen Waste Systems (since February, 2001), for pest control and for cooler and freezer repair.³⁵

26. After a citizen complaint, city inspectors observed an unrefrigerated truck delivering meat to the Las Americas store at 2750 Nicollet Avenue South on October 2, 2001. After unloading meat from the truck, workers loaded bags of chicken into the truck and placed it on top of other meat. They also observed crates of milk being loaded into an unrefrigerated van. The truck was registered to Selwin Ortega. Mr. Ortega was issued an order on October 5, 2001 to discontinue transporting potentially hazardous food in a unrefrigerated vehicle. On October 26, 2001, the city again received a complaint about an unrefrigerated truck being used by Las Americas. The city sent a letter on that date to Mr. Ortega advising him to immediately cease and desist transporting potentially hazardous food in a unrefrigerated vehicle and to contact the division for inspection of his vehicles.³⁶ Mr. Ortega acquired a refrigerated truck and had it properly marked, registered and decaled in November of 2001.

27. On January 3, 2002, inspectors conducted a routine inspection at 1850 Central Avenue N.E. where Las Americas owns a grocery store and restaurant. Mr. Ortega had been trying to sell the restaurant but buyers were discouraged by the code problems existing at the location. The name of the restaurant had been changed two

³¹ E.g., Exhibits 10-11, 23-24, 25-26, 38, 39-40, 50-51, 59-60, 81-82, 90-92, 105, 118-119.

³² Exhibit 129.

³³ Exhibit 130.

³⁴ Exhibit L, M, R.

³⁵ Exhibit N, P, Q.

³⁶ Exhibit 120.

days earlier to "El Trapiche Colombian Restaurant." The person in charge of the restaurant, who was named Juan, stated that he was testing Colombian food for sale but that Mr. Ortega still had the license for the restaurant.

28. The inspector determined that Juan had no knowledge of the food code and found seven critical violations and 15 regular violations at the restaurant that day, including raw meat being stored over ready to eat foods, a tray of meat on the prep table at 84° F. and a cart stored in front of the hand sink in the meat area.³⁷ The restaurant had no certified food manager or knowledgeable person in charge. The restaurant also had substandard non-functional venting equipment, improper gas installations and other plant deficiencies.³⁸ In June of 2001, the city specifically advised Mr. Ortega's attorney of the problems at this location with ventilation, gas hookups, flooring and shelving that needed to be corrected by a new owner.³⁹

Brian Herron

29. On January 17, 1996 then City Council member Brian Herron sent a memo to Licenses and Consumer Services stating that he had received several complaints about Las Americas at 401 East Lake Street. He stated that the complaints consisted of unauthorized parking, delivery trucks blocking traffic and commencing a remodeling project without city permit. He also stated that the questionable activities included checking cashing policies, harboring illegal aliens and trafficking stolen goods.⁴⁰ Mr. Herron later told Licenses and Consumer Services that they should just monitor the situation at 4th and Lake rather than scheduling a hearing.⁴¹ Mr. Ortega went to Herron's office after becoming aware of this memo and complained. He told Herron that these allegations were not true.

30. At some point after that Mr. Herron called Mr. Ortega and told him that a friend of his needed the 401 East Lake property and suggested that Mr. Ortega could give it to the friend. Mr. Ortega told him that the property was not available.

31. In approximately May of 1998, Mr. Herron and another man visited Mr. Ortega. Mr. Herron told Mr. Ortega that he had some financial problems and needed a loan of \$7,000. Mr. Ortega said he needed to talk with his wife about it. He later gave \$7,000 to Mr. Herron and Mr. Herron wrote a note stating that he would pay the loan off at the rate of \$200 per month.⁴²

³⁷ Exhibit 158, 160.

³⁸ Exhibit 158.

³⁹ Exhibit 163.

⁴⁰ Exhibit B.

⁴¹ Exhibit B.

⁴² Exhibit C.

32. In August of 1998 Mr. Ortega contacted the Federal Bureau of Investigation to report the interest-free loan in the amount of \$7,000 that he had made to Mr. Herron. Mr. Herron had not made any monthly repayments.⁴³

33. On September 14, 1998, Mr. Herron visited Mr. Ortega at one of his stores and gave Ortega \$3,000 in cash which he stated was a partial repayment of the \$7,000 loan. Mr. Herron then asked if Mr. Ortega was experiencing any problems. Mr. Ortega met with Mr. Herron on October 20, 1998 and Mr. Ortega asked about increased inspection scrutiny. This meeting was recorded by the FBI. Mr. Herron stated that he was unaware of any inspection issues concerning Mr. Ortega's property. He told Ortega that he would make some calls and "squash" problems with inspectors. Mr. Herron suggested that Ortega contact another businessman, Basim Sabri, who could tell Ortega how Mr. Herron did business.⁴⁴

34. At the direction of the FBI, Mr. Ortega contacted Mr. Sabri and they met on April 20, 1999 at Ortega's office. Sabri told Ortega that Mr. Herron wanted the remaining \$4,000 debt forgiven and the return of the promissory note that Herron had signed.

35. On June 7, 2001, Mr. Ortega again met with Mr. Herron to discuss the pending regulatory action against Las Americas by the City. This meeting was also recorded by the FBI. Mr. Herron stated that he understood the \$4,000 debt had either been forgiven by Ortega or paid off by Mr. Sabri.

36. On June 25, 2001, Mr. Herron arranged a meeting with Mr. Ortega, which took place in Mr. Herron's car at the Lake Street store. The FBI recorded the conversation. Mr. Herron told Mr. Ortega that he was not going to be shut down as long as he came into compliance. Mr. Herron then told Mr. Ortega that he hated to ask but that he had gotten behind on some bills that he needed to get out of the way. Herron told Ortega that he would "really knock out everything" for \$10,000.⁴⁵ They agreed to meet at 4:00 p.m. on June 27, 2001 at which time Mr. Ortega would give Herron the \$10,000. On that date Mr. Ortega gave Mr. Herron \$10,000 in bills that had been marked by the FBI and Mr. Herron said that he was not going to let anything happen to Ortega.

37. In a written statement dated June 29, 2001, Mr. Herron confessed to taking \$10,000 from Mr. Ortega as a bribe to prevent his licenses from being revoked. He also acknowledged the \$7,000 loan of which \$4,000 was not repaid.⁴⁶ Brian Herron pled guilty in Federal District Court to extortion on July 17, 2001. He was thereafter sentenced to prison. Herron had never contacted the Environmental Health Division about Las Americas.

⁴³ Exhibit E.

⁴⁴ Exhibit E.

⁴⁵ Exhibit E.

⁴⁶ Exhibit D.

38. In February of 2001, the Las Americas violations were scheduled for a TAC hearing at the Environmental Health Division. The problems were discussed and the parties arrived at a tentative compliance agreement to resolve the matter. The City Council, however, rejected the settlement in April of 2001 and voted to refer the matter to the Office of Administrative Hearings for an ALJ hearing. The City Attorney contacted the Office of Administrative Hearings on July 24, 2001 for assignment of an ALJ. On August 6, 2001, the City Attorney issued a Notice of Hearing setting the hearing for September 5, 2001. The case was continued several times at the request of the Licensee and with the agreement of the City. The hearing began on March 18, 2002.

39. After April of 2001 there have been fewer violations found at Las Americas stores during the City's inspections.

40. References to exhibits in these Findings of Fact does not mean that the exhibits are the exclusive or the only support for the findings since most findings are also supported by oral testimony.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minneapolis City Council and the Administrative Law Judge have authority to consider the allegations against the Licensee and the adverse action, if any, that should be imposed by the City under the Minneapolis City Charter Chapter 4, Section 16, under the Minneapolis City Code Section 188.350 and under Minn. Stat. § 14.55.

2. The City has compiled with all relevant substantive and procedural requirements of statute and rule.

3. The Licensee received timely and appropriate notice of the allegations against him and the time and place of the hearing.

4. The Minneapolis City Charter, Chapter 4, Section 16 states as follows:

Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such license for a violation of the provisions of any law, ordinance or regulation relating to the exercise of any right granted by such license, the City Council may revoke such license in addition to penalties provided by law or by ordinance for any such violation.

5. The Minneapolis Code of Ordinances, Title 10, Article 2, Chapter 188.350 states as follows:

Any license granted under this chapter may be revoked by the Mayor or the City Council as in the city charter provided.

6. The City has the burden of proof to establish, by a preponderance of the evidence, that good cause exists for taking adverse action against the business licenses held by Las Americas, Inc.⁴⁷

7. The requirements relating to food manager certification are set out in Minneapolis Code of Ordinances Sections 188.550 and 188.560.

8. The Licensee has failed to comply with the food management certification requirements.

9. The requirements for a person in charge at each food establishment location, with knowledge of food handling procedures, is set out in the Minnesota Food Code, Minn. Rule pt. 4626.0025 through pt. 4626.0035, as adopted into Minneapolis Ordinance Section 186.20.

10. The Licensee has failed to comply with the person in charge rules.

11. The requirements for proper storage of debris and maintenance of dumpster areas and areas adjacent to buildings are set out in Minneapolis Code of Ordinances Sections 188.460, 225.10, 225.40, 225.50, 259.125 and 536.20.

12. The Licensee has failed to properly maintain dumpster areas and has improperly stored trash and debris on its property.

13. The requirements for toilet and handwashing facilities are set out in the Minnesota Food Code, Minn. Rule pts. 4626.0065 through 4626.0120.

14. The Licensee has failed to comply with the rules relating to toilet and handwashing facilities.

15. The requirements in the food code relating to food holding temperatures, accurate thermometers, cross contamination of foods and improper storage of foods is found in the Minnesota Food Code at Minn. Rule pts. 4626.0165; 4626.0340 through 4626.0420, 4626.0620; 4626.0225-4625.0335; 4626.1520; 4626.1580; and 4626.1600-4626.1650.

16. The Licensee has failed to comply with the provisions of the Minnesota Food Code stated in Conclusion No. 15.

17. The requirements of the Minnesota Food Code relating to rodents and elimination of harborages for rodents are set out in the Minnesota Food Code at Minn. Rule pts. 4626.1565 and 4626.1570.

⁴⁷ In re Kaldahl, 418 N.W. 2d, 532, 535 (Minn. Ct. App. 1988).

18. The Licensee has failed to comply with the rules relating to rodents and elimination of harborages.

19. The Minneapolis Code of Ordinances relating to maintaining premises free of trash, debris and weeds, removing litter and debris within 100 feet of the property line on a daily basis are set out at Sections 227.90, 227.100, 259.125 and 536.20.

20. The Licensee has failed to comply with the ordinance requirements in regard to trash and debris.

21. Minneapolis Code of Ordinances Section 188.490 sets out the requirements for refrigerated trucks.

22. The Licensee violated the ordinance requiring a marked registered refrigerated truck to deliver perishable food.

23. The Minneapolis Code of Ordinances Section 188.160 requires City Council approval of the transfer of a restaurant license.

24. The City did not prove by a preponderance of the evidence that the Licensee transferred a license in connection with 1850 Central Avenue N.E.

25. The Licensee has the burden of proof to establish an affirmative defense of "motivation by personal or political animus" on the part of the City.

26. The Licensee has failed to prove any affirmative defense.

27. The City has demonstrated by a preponderance of the evidence that good cause exists for taking adverse action against the business licenses held by Las Americas, Inc.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Minneapolis City Council impose the following discipline:

1. The licenses of each Las Americas store are suspended for two consecutive days at a time during the next 60 days on a schedule to be determined by the Licensee. During the suspension the store must be closed and any unresolved code violations must be addressed.

2. Las Americas must provide one Food Manager Certification class per year for its employees, to be given at its stores. It must post the certificate of each food manager currently working at each store.

3. Las Americas must provide a dated contract to the Health Department for refrigeration maintenance and pest control.

4. Las Americas must post daily cleaning and equipment maintenance schedules, in English and Spanish, at each store. The schedules must show when cleaning was completed, and by whom, and when temperatures were monitored and the results.

5. The City will not approve any licenses for new establishments for the Licensee for a period of six months.

6. The Licensee must pay an administrative fine of \$10,000.

Dated this 12th day of June 2002.



GEORGE A. BECK
Administrative Law Judge

Reported: Tape-recorded, 17 Tapes-No Transcript Prepared.

NOTICE

The agency is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Minneapolis City Charter provides that the City Council may revoke any license issued by the City "upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such a license..." The Minneapolis City Code echoes this provision. Las Americas argues that the charter provision requires both a showing of good cause, and a conviction in court in order to support a license revocation.⁴⁸ Las Americas has not been convicted in court of a violation

⁴⁸ The Licensee also reserves its right to facially challenge the constitutionality of the City Charter provision but recognizes that such a challenge is within the exclusive province of the judicial branch. Holmberg v. Holmberg, 588 N.W. 2d 720 (Minn. 1999); Neeland v. Clearwater Memorial Hospital, 257 N.W. 2d 366, 368 (Minn. 1977).

relating to its license. It argues that the plain and ordinary meaning of the word "and" suggests that both "good cause" and a conviction in court must be shown.

This interpretation proposed by the Licensee does not, however, give any meaning to the semicolon in the sentence. The use of the semicolon implies a degree of separation beyond that of a comma or beyond that of no punctuation at all. Separation suggests the requirements are alternatives. Therefore, the plain meaning would seem to be that a license can be revoked either for good cause or upon a relevant conviction in court. A court conviction is an additional grounds for revocation rather than an additional requirement. Restricting license revocation to situations in which a court conviction has been first obtained, would also be an absurd result that could not have been intended by the drafters of the City Charter.⁴⁹ Additionally, in the recent case of Hard Times Café v. City of Minneapolis,⁵⁰ the court clearly assumed that the license could be revoked without a criminal conviction. A court conviction is not a prerequisite to license revocation.

Las Americas also argues that revoking a license for "good cause" is a vague standard that can only be rendered constitutional by adding a court conviction to its requirements. However, in the Hard Times Café case the "good cause" standard in the Minneapolis City Charter was found to be sufficiently definite to permit the licensee to know that it would be subject to adverse action. It did not render the statute constitutionally infirm. The Hard Times Café case involved multiple drug transactions on and around the café's premises. The Court of Appeals determined that the Licensee would not have to guess that such activity was of the type that constituted good cause for license action. The good cause standard has been applied and upheld in other license cases.⁵¹

In this case, the City alleges violations of the Minnesota Food Code which has been adopted by reference into the Minneapolis City Ordinances. The Licensee was provided with written inspection reports referring to specific rules which are described as "violations." The inspection reports advised the Licensee that a failure to comply may result in legal action. No ordinary person would have to guess that violations of the food code could result in adverse food establishment license action. The main reason for licensing food establishments is to ensure public health, which is the goal of the Minnesota Food Code. Also, a license holder is specifically required to comply with the Minnesota Food Code by Minneapolis Code of Ordinances Section 188.360.

The Licensee argues that there are no provisions in the City Charter or the City Code authorizing any sanction in a license case other than revocation. However the power vested in a municipal body to revoke a license includes the power to impose lesser sanctions such as suspension, censure, conditional licensure, or fines.⁵² In fact, such an interpretation would be unfair to the Licensee since the City Council would be

⁴⁹ Minn. Stat. § 645.17(2).

⁵⁰ 625 N.W. 2d 165 (Minn. Ct. App. 2001).

⁵¹ Cup Foods, Inc. v. City of Minneapolis, 633 N.W. 2d 557 (Minn. Ct. App. 2001).

⁵² In Re Walker's License, 210 Minn. 337, 300 N.W. 800, 802 (1941) ("It is clear, however, that the power to revoke a license includes the power to suspend. It is a case where the greater includes the lesser.")

unable to match the discipline to be imposed with the facts as determined in the hearing process.

Throughout this proceeding the Licensee has maintained that the licensing action against it is inappropriate because it is based upon corrupt political considerations. Generally, a license action may violate the constitutional right to substantive due process if it is "motivated by personal or political animus" and is "so egregious and irrational that the action exceeds the standards of inadvertence and mere errors of law."⁵³ The Licensee bears the burden of establishing this affirmative defense by a preponderance of the evidence.

The facts in this case establish that former City Council member Brian Herron accepted cash payments and loans from Ortega. Mr. Herron did so by promising to "squash" problems with inspectors and by telling Mr. Ortega that he wasn't going to let anything happen to him. Las Americas argues that, because of Herron's illegal conduct, any adverse action taken against its licenses by the City Council will be tainted with the appearance of impropriety.

As the City points out, both the U.S. Attorney's office and an outside special investigator conducted extensive investigations into the corruption allegations for the City. The Licensee itself made a comprehensive data practices request for all records relating to Las Americas and Selwin Ortega prior to the hearing. It deposed two City Council members as well as a number of inspectors. Despite all of this, no evidence has been developed to support a "corrupt purpose" defense. The environmental health division personnel testified that there was no contact with Mr. Herron or his staff at any time. Nor was any evidence developed that suggests that Mr. Herron initiated the TAC hearings or somehow persuaded his colleagues to unanimously send this matter for a hearing at the Office of Administrative Hearings. The Licensee alleges, but has failed to prove, a direct relationship over the past several years between Mr. Ortega's interactions with Mr. Herron and the City's inspection activity at the Las Americas stores. The Licensee suggests that a corrupt motive on the part of the City can be inferred. But there is no credible evidence to support its claim.

Finally, the Licensee was unable to demonstrate any correlation between the conduct of Brian Herron and that of City inspectors. At the time of Mr. Herron's 1996 memo to the Licenses Division only one Las Americas store was open and there was no corresponding increase in health inspections. When Brian Herron reluctantly paid back \$3,000 of a loan to Mr. Ortega on September 14, 1998, Mr. Ortega perceived that he was subjected to a "full army" of inspectors. The inspection reports, however, do not support this allegation. Nor was any correlation between the activities of Brian Herron and food inspections demonstrated. Rather it appears that the inspectors were generally conducting two routine scoring inspections per year, with reinspections as necessary, and responding to all public complaints.

⁵³ Northpointe Plaza v. City of Rochester, 465 N.W. 2d 686, 691 (Minn. 1991); Zeman v. City of Minneapolis, 540 N.W. 2d 532, 538 (Minn. Ct. App. 1995).

In its written post-hearing submission Las Americas does not argue that it had no food code violations. Rather it pointed out that most food establishments, and especially those with a meat market or restaurant were likely to have some violations. Reinspections of food establishments are required where there are a large number of critical or non-critical violations. A substantial percentage of food establishments require reinspections. What sets Las Americas apart, however, is the number of violations requiring reinspection as well as a failure to correct certain violations despite repeated inspections. The violations relating to toilet and handwashing facilities, food holding temperatures, cross contamination of foods and improper storage of food are clearly serious public health concerns that the Licensee failed to find time to correct in a prompt manner. The continued violations evidence an inadequate concern about compliance with the food code. And, while the City acknowledges that Las Americas has done a better job of complying with the food code since approximately May of 2001, there have been some subsequent significant violations. In October of 2001, Las Americas continued to use an unrefrigerated unregistered truck to transport meat after having been warned not to do so. In January of 2002, Mr. Ortega turned over a restaurant at 1850 Central Avenue to an unlicensed independent contractor and numerous violations resulted.

At the heart of the Licensee's problems with food code compliance was its failure to have a supervisory employee with a food manager's certificate at each location, as well as a "person in charge" at each store when the food manager was not present. The food manager and the person in charge are important elements in preventing food borne illnesses, ensuring sanitary preparation and handling of food products and in establishing approved sanitation practices and techniques in food stores and restaurants.

The Licensee argues that it enrolled its employees in food manager certification courses as soon as it was notified of their availability in Spanish. The record does not support this claim, however. The record indicates that one Spanish food manager certification class was given in 1997, three in 1998 and several more in 1999 and 2000. Notice was provided to food establishment licensees and Las Americas was frequently told in routine inspections of the need for certified food managers. Despite these opportunities, as of February 9, 2001, only two of the licensed Las Americas food stores had a certified food manager. It was not until late in 2001 that food managers were assigned to each of the Licensee's locations.

Mr. Ortega's obligation was not only to enroll his employees, but to have certified food managers at his stores to protect the public. The absence of a food manager or a trained person in charge at the various locations resulted in a failure to provide onsite supervision of employees in proper sanitation and cleanliness practices, such as the testing of hot and cold holding temperatures, prevention of cross contamination between raw meats and other products, correction of improper storage, and the cleanup of debris and pest harborages. The record shows that as Las Americas rapidly expanded the number of stores in Minneapolis from 1994 to 1998, it failed to provide adequate management to ensure the public health.

The Licensee has also had problems maintaining outdoor areas around its stores free of trash or debris and weeds. Grocery stores are required to remove debris within 100 feet of their property line on a daily basis. The violations by the Licensee are set out at Finding of Fact No. 22. The Licensee points out that some of the garbage citations were the responsibility of other businesses. Additionally, in early spring some of the garbage problems was caused by garbage stuck in the ice. Although the Licensee now has a new garbage hauler in place at its stores in order to prevent overflowing of garbage in its bins, it is clear, as the pictures in the record demonstrate, that it had an ongoing problem in this regard from 1998 to early 2001.

The City has asked the Administrative Law Judge to make a specific recommendation as to the appropriate discipline in this case. The City has not recommended revocation of the Licensee's licenses. It does suggest, however, that the sanctions should recognize that no substantial effort was made by Las Americas, for a significant period of time, to hire and train certified food managers to deal with pest control, refrigeration, trash storage problems and other food code violations, until the City threatened licensing sanctions. It believes that without specific conditions of operation there is no reasonable expectation that the Licensee will comply with City Code requirements.

The City recommends that each store be suspended for seven consecutive days during the next 90 days as determined by the Licensee. It suggests that the Licensee be ordered to correct all unresolved violations with a follow-up inspection to be paid for by Las Americas. It asks that Las Americas provide one food manager certification class per year at its stores, and that it provide dated contracts for refrigeration maintenance, cleaning service and pest control. It requests posting of daily cleaning and equipment maintenance schedules in all stores, that no new licenses be approved for a period of one year, and that the Licensee pay an administrative fine of not less than \$5,000.⁵⁴ The City argues that a one year delay in opening new stores or obtaining short term permits will allow the Licensee to concentrate on remedying deficiencies that exist at its stores.

Las Americas asserts that its stores should not be closed since they are currently in substantial compliance with the code provisions. It suggests that requiring it to be free of any violations is an impossible standard. It points out that it has refrigeration maintenance and pest control contracts and that there is no requirement in the food code that an outside contractor be hired to clean the kitchens, nor was this a specific problem for Las Americas. It argues further that a prohibition on new licenses or permits is unjustified and violates its substantive due process rights. It points out that it regularly organizes street festivals for the Mexican holidays of Cinco de Mayo and Mexican Independence Day. It suggests there is no evidence that Las Americas abused its permits for these events.

⁵⁴ City of Minneapolis closing argument, p. 16-18.

As the City acknowledges, the revocation of a license in this situation would be inappropriate. There are several mitigating circumstances that should be considered including Brian Herron's illegal activities and the resulting time devoted by Mr. Ortega to his cooperation with the FBI. Another factor to consider is the extent to which language barriers affected the City's ability to communicate and the Licensee's ability to understand the food code violations and requirements. Mr. Ortega had very few English speaking employees. The City has only one Spanish speaking inspector. Communication problems hampered inspections and created difficulties and delays in obtaining food manager certifications. The City also acknowledged that with the adoption of the new food code in 1999, a larger number of violations were cited than previously. In addition, given that this proceeding covered a five-year time period (1996-2001) during which numerous inspections were conducted, it is not unexpected in the food/restaurant business for a licensee to have a number of violations. And finally, the City Council may consider the positive impact that Las Americas has had on the area surrounding its first two stores.⁵⁵ While these factors do not excuse the repeated violations, they should be considered in choosing a sanction.

An appropriate sanction should relate to the nature, the severity and the chronicity of the violations. A suspension of the license for each store is appropriate to impress upon the Licensee the seriousness of its failure to promptly comply with the food code. It would be appropriate to direct the Licensee to correct any existing problems in the stores during their period of closure. A suspension for two consecutive days at a time during the next 90 days to be determined by the Licensee is a reasonable sanction. A seven day suspension is excessive given the nature and chronicity of the violations as well as the mitigating circumstances. Given the Licensee's relatively improved compliance beginning in mid-2001, it does not seem appropriate to direct it to resolve all code violations and pay for the cost of inspections. The requirement that it provide at least one food manager certification class per year at its stores is, however, directly linked to its most prominent violations and is reasonable.

The record justifies Las Americas providing the health department with dated contracts with a refrigeration maintenance company and a pest control operator for all stores. This is a minimal burden on the Licensee since it has contracts in place. The requirement that it provide a contract with a cleaning service to clean its kitchens, however, does not appear to be necessary, especially in light of the recommended requirement that it post daily cleaning and equipment maintenance schedules in English and Spanish at all stores. The City's suggestions that the Licensee be ordered to remove litter and trash, provide a full-time person in charge and remove graffiti merely echo existing requirements and do not need to be separately ordered.

The City also suggests that the City Council not approve licenses for new establishments, special events or short term operations for Las Americas for one year. There is no specific showing that the Licensee has had any problems with special events or short term operations and it in fact sponsors two civic celebrations each year.

⁵⁵ Finding of Fact No. 2.

Its opening of new stores in a rapid fashion, however, has contributed to its regulatory problems. Since the Licensee's adherence to City regulatory requirements have improved in the past year, it is recommended that it not be allowed to apply for any licenses for new food establishments for a period of six months. This period of time should be sufficient to allow the Licensee to comply with the code should it decide to expand. An administrative fine is justified by the record not only to impress upon the Licensee the consequences of ignoring the food code but also to help defray the cost of the regulatory effort by the City. The record indicates that this fine would not be an undue burden on the Licensee

G.A.B.

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CERTIFICATE OF SERVICE

Case Title:	OAH Docket No.:
In the Matter of Las Americas, Inc.	1-6010-14421-3

Cindy Ringdahl, certifies that on the 12th day of June, 2002, she served a true and correct copy of the attached FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDED DECISION; by placing it in the United States mail with postage prepaid, addressed to the following individuals:

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